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# **Shipper's title to sue after the transfer of the bill of lading**

**- A comparative study for the reform of Chinese Maritime Law**

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**Abstract:** Cargo interests' title to sue the carrier to recover loss or damage caused by the carrier's fault is a crucial issue in carriage of goods by sea. However, the current Chinese Maritime Code 1992 does not provide an explicit provision on this issue. One significant problem that arises therefrom is whether the shipper who has transferred the bill of lading to the endorsee/consignee is still entitled to sue the carrier. This article critically examines the relevant provisions of the Chinese Maritime Code and judicial practice in this respect and pinpoints the loophole in Chinese Maritime Code that gives rise to the aforesaid problem. In addition, based on reviewing various approaches adopted by the UK law, the US law and the UNCITRAL Drafts on carriage of goods by sea, this article sets forth recommendations for reforming Chinese Maritime Code.

## I

### INTRODUCTION

In maritime trade, it is a common practice that one bill of lading embeds the contract of carriage into numerous transactions of goods covered by the bill. By transferring the bill of lading, the rights under the contract of carriage is passed from one cargo interest to another.<sup>1</sup> In such a situation, the cargo interests and the carrier may have different concerns if the cargo is damaged or lost during transit. On the one hand, the cargo interests who suffered actual loss or damage may be concerned about losing their title to sue the carrier for indemnity.<sup>2</sup> On the other hand, the carrier may be in fear of

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<sup>1</sup> For example, this is the case provided by Carriage of Goods by Sea Act 1924 (UK) (Hereinafter referred to as COGSA 1924), s.2 and Maritime Code of the People's Republic of China (Hereinafter referred to as CMC), arts. 71 & 78. In commercial practice, such a phenomenon is common in a string sale of goods. See Alexander von Ziegler, *Alexander Von Ziegler, Rotterdam Rules and underlining sale contract*, CMI year book 2013 PART II - THE WORK OF THE CMI, at 277 (2013).

<sup>2</sup> Sometimes the party who actually suffered loss or damage may not be the party who is entitled to sue the carrier by law. For example, according to COGSA 1924 s 2(5), the shipper who suffers the loss but

assuming multiple claims from more than one cargo claimants.<sup>3</sup> To relieve such concerns and properly balance the interests between the carrier and the cargo interests, jurisdictions with strong maritime trading industries, such as the UK and the US, have developed explicit rules to address the issues in respect of cargo interests' title to sue.<sup>4</sup> These issues have also drawn the attention of the drafters of international conventions governing carriage of goods by sea, such as, the drafts on the Carriage of Goods [Wholly or partly][by Sea] done by United Nations Commission on International Trade Law (Hereinafter referred to as UNCITRAL Drafts).<sup>5</sup> A common position upheld by these national and international legislations is that the party to whom the bill of lading is transferred with a lawful reason has the right to sue the carrier under the contract.

In China, the Chinese Maritime Code (CMC)<sup>6</sup> does not expressly and directly deal with the cargo interests' right to sue, it nevertheless expressly provides rules to govern the relationship between the carrier and the consignee or the holder of the bill of lading,

is without lawful possession of the bill of lading is not entitled to sue the carrier in contract.

<sup>3</sup> Since in some international transactions, such as the CIF contract, the cargo may be re-sold several times during transit, more than one party may be involved before the cargo arrives at its destination. In this instance, it may be difficult for the carrier to identify who is the qualified cargo claimant.

<sup>4</sup> In the UK, issues in respect of cargo interests' title to sue are provided by COGSA 1924 and common law; and in the US, these issues are covered by Federal Bills of Lading Act 1916 (Hereinafter referred to as FBLA 1916) and common law.

<sup>5</sup> This can be seen from a series of preparatory documents drafted by UNCITRAL for the Rotterdam Rules, which include United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.21), 8 January 2002; United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work of its eleventh session (A/CN.9/526), 4 April 2003; United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.32) 4 September 2003; United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.56) 8 September 2005; United Nations Commission on International Trade, Transport Law : Preparation of a draft convention on the carriage of goods [wholly or partly][by sea] Right of suit and time for suit: document presented for information by the Government of Japan (A/CN.9/WG.III/WP.76).

<sup>6</sup> The Maritime Code of the People's Republic of China 1992 was enacted in 1992, and came into force on 1 July 1993.

stating that these parties shall enjoy rights and assume obligations under the contract of carriage.<sup>7</sup> It is submitted that those contractual rights include the right of suit. Therefore, it could be deemed that the law vests in the consignee or the holder of bill of lading the title to sue. However, the law does not address what impact the transfer of a bill of lading would have on the shipper's right to sue who is an original party to the contract of carriage.<sup>8</sup> Under such a circumstance, if the shipper suffers loss or damage to the goods caused by the carrier's default after the transfer of the bill of lading,<sup>9</sup> it is questionable whether the shipper is entitled to bring a contractual action against the carrier. As a result, inconsistent judicial judgements have been made on similar cases and controversial views have been given by scholars on this issue. The lack of statutory rules in the CMC may cause further disputes. The best way to resolve the problem in respect of the shipper's title to sue is to establish explicit rules in the CMC in this respect. To achieve this aim, this article reviews relevant provisions of the CMC and relevant Chinese cases and attempts to detect the loophole in the CMC on the shipper's title to sue. Approaches on the counterpart adopted in other jurisdictions are examined with the purpose to find better solutions for reforming Chinese law on this aspect.

## II

<sup>7</sup> CMC, art. 78(1).

<sup>8</sup> As general rules, under a CIF contract the seller is usually the shipper who makes the contract of carriage of goods with the carrier and under an FOB contract, the buyer is usually the shipper. While under English common law, FOB contract is a flexible instrument, in some FOB contracts, the seller may be the shipper. See *Pyrene & Co v Scindia Navigation Co Ltd* [1954] 2 All ER 158.

<sup>9</sup> In theory, in maritime trade, the shipper could not suffer loss after the risk passes to the buyer and after the bill of lading has been transferred to the buyer. However, in practice, the party who suffers real loss may be the shipper rather than the buyer. Examples will be given later.

## **CRITICAL REVIEW OF ARTICLES 71 AND 78 OF CMC**

In China, matters of bill of lading are covered by articles 71 – 80 under Section 4 (Transport Documents), Chapter 4 (Contract of Carriage of Goods by Sea) of the CMC. Among these articles, articles 71 and 78(1) are relatively closely related to the issue to be discussed in this paper. Article 71 provides:

A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A clause in the document stating that the goods are to be delivered to the named person or to the order of a named person, or to the bearer, constitutes such an undertaking.

This article defines the bill of lading as a document which is an evidence of the contract of carriage of goods by sea and a receipt that proves carrier's taking over and loading the goods on board the vessel and a document against which the carrier shall deliver the goods to a right person.

Article 78(1) addresses the effect of a bill of lading after it has been transferred to a third party, it provides:

The relationship between the carrier and the consignee or the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading.

However, neither article 71 nor article 78(1) directly deals with the issue on cargo interests' title to sue the carrier. Nevertheless article 78(1) may shed some lights on the point of the right to sue by the holder of the bill of lading. This sub-article indicates that it is the bill of lading that creates a contractual relationship between the carrier and the consignee or the holder of the bill who is a third party to the contract of carriage. From this provision, it can be inferred that the holder of the bill of lading is entitled to sue the carrier under the contract of carriage once the bill of lading is transferred to him even though the holder is not a contractual party to the original contract of carriage. This is indeed the common position recognized in Chinese judicial practice.<sup>10</sup> However, the provision does not mention or imply whether a shipper is entitled to sue the carrier after the transfer of the bill of lading. This issue is open to debate in both academia and judicial practice.

### ***A. Debates in Academia***

Some scholars argue that Article 78(1) indicates that the transfer of the bill of lading will, at the same time, transfer the contract of carriage *per se*.<sup>11</sup> This means that once the shipper transfers the bill of lading to the consignee/endorsee, his contractual title to sue will vanish as such rights shall be transferred to the holder of the bill of lading. Therefore, the contractual title to sue the carrier should be exclusively vested in the

<sup>10</sup> This position is underlined by the Supreme People's Court of PRC Announces Interpretation on Several Issues of Delivery Without Production of Original Bill of Lading 2009 (adopted on 16 February 2009, entered into force on 5 March 2009), art 3 "Where any loss is caused to the holder of an original B/L due to delivery of goods by a carrier without the original B/L, the holder may request the carrier to bear the liability for breach of contract or tort."

<sup>11</sup> Yuzhuo Si & Zhiwen Li, Study on the theories of Chinese Maritime Law, at 351(1st ed. Beijing University Press 2009).

holder of the bill.<sup>12</sup> This view is similar to the arrangement under the UK Carriage of Goods by Sea Act (COGSA 1992)<sup>13</sup> and the purpose of this arrangement is to prevent trafficking of bills of lading. In this sense, this argument may be helpful to mitigate the risk of multiple claims suffered by the carrier.<sup>14</sup> However, it is less favorable to the shipper who sustains actual loss after the bill of lading being transferred to the consignee/endorsee.

Some others have a different view. They argue that in consideration of the fact that a shipper may sometimes sustain substantial loss after the transfer of the bill of lading, the shipper should be allowed to retain the contractual right to sue.<sup>15</sup> Scholars holding such a view claim that since the bill of lading only evidences the terms of the original contract of carriage,<sup>16</sup> the transfer of the bill of lading would only transfer the rights and obligations incorporated in the bill of lading rather than the entire contract to the holder.<sup>17</sup> From this view the bill of lading and the contract of carriage may be deemed

<sup>12</sup> Yuechuan Jiang, Cargo interest's title to sue in the carriage of goods by sea, at 129 (Dphil Thesis, Dalian Maritime University 2011); Yuzhuo Si, the uniformity of international transport law, at 320 (1<sup>st</sup> ed. Beijing Normal University Publishing Group 2012); Tingzhong Fu, The Principle of Chinese Maritime Law, at 44 (1<sup>st</sup> ed. Law Press China 2015).

<sup>13</sup> Carriage of Goods by Sea Act 1992, s.2(5) provides: "Where rights are transferred by virtue of the operation of sub-section(1) above in relation to any document, the transfer for which that sub-section provides shall extinguish any entitlement to those rights which derives – (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage ..."

<sup>14</sup> As addressed by the UK Law Commissions, one important aims of the COGSA 1992 is to prevent "trafficking in bills of lading simply as pieces of paper which give causes of action against sea carriers." See The Law Commission and The Scottish Law Commission Law Commission, Rights of Suit in respect of Carriage of Goods by Sea, at para 2.43, Law Com No.196; Scot Law Com No.130 (1991).

<sup>15</sup> Yu Guo, Shipper's right of sue against the carrier after assignment of bill of lading, 6 Annual of China Maritime Law 50,54-56 (2010).; See also Yuzhuo Si &Lixin Han, The study on the Uniformity of international cargo transport law, at 319-322 (1<sup>st</sup> ed. Beijing Normal University Publish Group 2012).

<sup>16</sup> Article 71 of the CMC provides that the bill of lading is an evidence of the contract of carriage. The English also treat the bill of lading as an evidence of the contract of carriage in the hands of the seller/shipper. But once it is transferred to the third party consignee/indorse, it becomes the contract itself. See also English case Crooks v Allan (1879) 5 QBD 38; SS Ardennes (Cargo Owners) v SS Ardennes (Owners) [1951] 1 KB 55; Carriage of Goods by Sea Act 1992 (UK), s.5(1).

<sup>17</sup> Zhiwen Li, Hot issues in the Law of International Carriage of Goods, at 290 (1<sup>st</sup> ed. Law Press-China



as two separate contracts which respectively govern the relationship between the shipper and the carrier, and the relationship between the holder and the carrier.<sup>18</sup> This means that either party, the shipper or the holder, who has suffers actual loss should be entitled to sue the carrier based on their respective contractual relationship with the carrier.<sup>19</sup> It is submitted that the “two separate contracts” view is not convincing but confusing. Since, as a general rule, the bill of lading, when in the hands of the shipper, is the evidence of the contract of carriage,<sup>20</sup> and once transferred to a third party it becomes the contract of carriage between the carrier and the holder.<sup>21</sup> The transfer of the bill amounts to transfer of the contract and shall have transferred to, and vested in, the holder all rights of the contract (including the right of suit), as if the contract contained in the bill of lading had been made with himself. So it is hard to understand why the contractual title to sue, which is supposed to subsist only on one cargo interest, can be simultaneously vested in both the shipper and the holder and under two separate contracts.<sup>22</sup> Therefore, as a matter of law, it is logical to arrive at the conclusion that once the bill of lading is transferred, the shipper’s title to sue under the original contract of carriage shall be vanished since all the contractual rights including the right of suit are transferred to the third party, unless otherwise agreed by the parties. This is also the English approach under the Carriage of Goods by Sea Act 1992.<sup>23</sup>

2012).

<sup>18</sup> *id.* at 290-291.

<sup>19</sup> *id.* See also Yu Guo, Shipper’s right of sue against the carrier after assignment of bill of lading, 6 Annual of China Maritime Law 50, 52 (2010).

<sup>20</sup> Art.71 of the CMC. See also English case Crooks v Allan (1879) 5 QBD 38; SS Ardennes (Cargo Owners) v SS Ardennes (Owners) [1951] 1 KB 55; Carriage of Goods by Sea Act 1992 (UK), s.5(1).

<sup>21</sup> Art.78 (1) of the CMC. See also the English case of Leduc v Ward (1888) 20 Q.B.D. 475.

<sup>22</sup> Yuechuan Jiang, Cargo interests’ title to sue in the carriage of goods by sea, at 130 (Dphil Thesis, Dalian Maritime University 2011).

<sup>23</sup> Carriage of Goods by Sea Act 1992, s.2(1) and s.2(5)(a) . The two rules will be examined later.

Nevertheless, the reason given by the scholars who hold that second view is worthy to be considered, that is, ‘a shipper may sometimes sustain substantial loss after the transfer of the bill of lading, so the shipper should be allowed to retain the contractual right to sue.’ This is also the point this article intends to discuss.

### ***B. Controversial Decisions in Judicial Practice***

Due to the lack of statutory rules, in China, the controversy on the issue whether the shipper has a title to sue after the transfer of the bill of lading can also be found in judicial practice. Controversial judgements have been made to cases with similar facts.

#### (a) The definition for shipper under the CMC

Before discussing the Chinese judicial practice relating to the shipper’s right to sue, it is worthwhile to examine the meaning of the ‘shipper’ under the CMC. Article 42(3) of the CMC defines the shipper as

- (a) the person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier; or
- (b) the person by whom or in whose name or on whose behalf the goods have delivered to the carrier involved in the contract of carriage of goods by sea.

It could be understood that the CMC recognizes both contractual shipper and actual shipper. Article 42(3)(a) refers to the contractual shipper and (b) refers to the actual

shipper. Under a CIF contract these two types of shippers are usually the same person, *i.e.* the seller.<sup>24</sup> While under a FOB contract, the contractual shipper and the actual shipper are usually different persons, the buyer acts as the contractual shipper who concludes the contract of carriage with the carrier and the seller acts as the actual shipper who actually delivers the goods to the carrier for shipment.

No matter whether the person is a contractual shipper or an actual shipper, the CMC does not address his title to sue when he is parted with the lawful possession of a bill of lading. In judicial practice, the courts made different decisions on cases which have similar facts.

Under FOB contracts, the party who concludes the contract of carriage with the carrier and thereafter is named as the ‘shipper’ on the bill of lading is usually the buyer, whilst it is the seller who acts as an ‘actual shipper’ to deliver the goods to the carrier.<sup>25</sup> As a result, if the seller for some reasons sustains loss or damage caused by the carrier’s default, it is questionable whether the FOB seller is entitled to sue the carrier in contract for indemnity. A FOB seller may, by virtue of the CMC,<sup>26</sup> argue that he is an ‘actual shipper’ and thereby should be entitled to sue the carrier as if he has a direct contractual relationship with the carrier. Such an argument may not always be upheld by courts as

<sup>24</sup> Under a CIF contract, it is the seller’s duty to arrange carriage of goods by sea, and actually deliver goods to the carrier for carriage. See Incoterms CIF 2010.

<sup>25</sup> Wei Wang, Law and Practice for the Delivery of Goods without Presentation of Original Bills of Lading - A Comparative Study on Relevant Legal Issues of International Carriage of Goods by Sea, at 139 (1<sup>st</sup> ed. Law Press 2010).

<sup>26</sup> See CMC, art 42 (3) “Shipper means: (b) The person by whom or in whose name or on whose behalf the goods have delivered to the carrier involved in the contract of carriage of goods by sea.”

the CMC does not address what requirements should be met for a FOB seller to be treated as an ‘actual shipper’. In judicial practice, in order to obtain the title to sue, in addition to showing the fact of performing the obligation of delivering goods to the carrier, the seller may also be required by the court to prove that he is the ‘lawful holder of the bill of lading’ so as to validate his legal status as an ‘actual shipper’.<sup>27</sup> Apparently such a requirement is of little favor to a FOB seller who does not possess the bill of lading or to whom the bill of lading is not transferred lawfully.<sup>28</sup> In this sense, although the CMC tends to protect a FOB seller who actually performs the shipper’s duty, it does not achieve a desirable result in practice.

The seller under a CIF contract is, no doubt, the contractual shipper and the actual shipper. Such a shipper may, in some situation, also suffer loss or damage after the transfer of the bill of lading. Due to the lack of statutory provision the courts have made

<sup>27</sup> For instance, in *Beijing Wen-yang Imp. & Exp. Co. Ltd. v. Shanghai COSCO Shipping Co. Ltd* (1999), although the FOB seller in fact performed the shipper’s obligation to deliver the goods to the carrier, the Higher People’s Court of Tianjin Municipality held that the FOB seller did not have contractual right to sue the carrier for releasing goods without presentation of an original bill of lading. The court made such a judgement on the ground that the FOB seller was neither the “Shipper” named on the bill of lading nor the “Holder” of the bill of lading to whom the bill of lading should have been properly indorsed. This case is cited from Wei Wang, *Law and Practice for the Delivery of Goods without Presentation of Original Bills of Lading-A Comparative Study on Relevant Legal Issues of International Carriage of Goods by Sea*, at 141-142 (1<sup>st</sup> ed. Law Press 2010). Similar reasoning can also be found in *Anji Fuli Furniture Co., Ltd v. On time Shipping Line Co., Ltd* (2012), PKULAW (June 5, 2016), [http://pkulaw.cn/fulltext\\_form.aspx?Db=qikan&Gid=1510113892](http://pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=1510113892). In this case, the Higher People’s Court of Shanghai Municipality held, since the FOB seller was not a person to whom the bill of lading was lawfully transferred, the seller was not entitled to sue the carrier for misdelivery as an “Actual Shipper” provided by CMC. Although the bill of lading involved in this case was a straight bill of lading, the court pointed out that the conclusion would be the same if the bill of lading were an order bill of lading. This indicates that for being an “Actual Shipper” provided by CMC, the FOB seller should prove that the bill of lading is transferred to him by following the legal procedure which requires a proper indorsement.

<sup>28</sup> The latter situation is quite common in practice, especially in the case where the bill of lading is sent back by the bank after the buyer’s rejection to pay for the goods. In such a situation the bill of lading is usually transferred back to the seller without proper indorsement as the buyer who is the “Shipper” named on the bill of lading may have never actually held the bill of lading. See Jie Zhu, *the Shipper’s title to sue in judicial practice*, Annual of Chinese Maritime Trail 2008-2009, Mar. 2010, at 225.

different decisions.

(b) Judgements made for shipper

In *Zhejiang Textiles Import & Export Group Ltd. v. Taiwan Uniglory Marine Co.*,<sup>29</sup> the key issue was whether a party, who actually delivered the good to the carrier at the port of shipment but was not named in the bill of lading, may, as an actual shipper, sue the carrier.

In this case, the goods were sold by Zhejiang Textiles Import & Export Group Ltd (China) to Company K (Iraq). As the beneficiary named on the letter of credit, Zhejiang Textiles received the documents under the letter of credit issued by Hbz Finance Limited (the buyer's bank). As required by the documents, the shipper on the bill of lading was named as "AL Hosan For Import and Export/Al Faris For Import," and the consignee was named as 'to order of High Education and Scientific Research of Iraq.'<sup>30</sup> After paying up the freight to the carrier, the seller acquired the whole set of original bills of lading from the carrier and then submitted the bills to Bank of Communication Hangzhou Branch of China (Seller's bank) for collecting payment from Hbz Finance Limited. When the ship arrived at the destination, the goods were released to a local

<sup>29</sup> (2005) Higher People's Court of Shanghai Municipality, cited from Xinlong Ying, *Selected maritime cases of Shanghai Maritime Court China*, at 87-88( 1<sup>st</sup> ed. Law Press China 2011). In this case, this goods were sold under a CIF term.

<sup>30</sup> In this case, the cargo trading between the seller "Zhejiang Textiles" the ultimate buyer "High Education and Scientific Research of Iraq" was done through multiple intermediate agents. Despite without authoritative report, it is believed that the shipper "AL Hosan For Import and Export/Al Faris For Import" and the buyer "company K" were the agents of "High Education and Scientific Research of Iraq".

agent of High Education and Scientific Research of Iraq by the carrier without against presenting any original bill of lading. Later the buyer refused to fulfil the obligation of payment under the letter of credit,<sup>31</sup> and all documents under the letter of credit including the whole set of original bills of lading were returned to Zhejiang Textiles but without being endorsed by the buyer, the High Education and Scientific Research of Iraq. Zhejiang Textiles then sued the carrier for releasing the goods to a third party without against the presentation of the bill of lading.

Although Zhejiang Textiles was not the named shipper in the bill of lading, the court nevertheless upheld the claim and held that since Zhejiang Textiles was the party who booked the space of vessel, paid the freight and handed over the goods to the carrier, it should be deemed as an “actual shipper” who had established the contractual relationship with the carrier. In addition, the court noted that although the shipper in such a situation was not the holder as defined in art. 78(1) of the CMC as the bill of lading was not properly endorsed to him, he should be entitled to sue by virtue of its legal status as an “actual shipper”.<sup>32</sup>

Similarly, in *Hunan Huasheng Industrial & Trading Co. Ltd v. Shandong Yantai International Marine Shipping Co. Ltd and Shandong Yantai International Marine*

<sup>31</sup> The reported case does not indicate how the buyer claimed delivery of goods without production of an original bill of lading. However, in commercial practice, the carrier may agree to release goods to the buyer once the buyer is able to provide a letter of indemnity which exempts the carrier from the liability of misdelivery.

<sup>32</sup> CMC, art.42 (3) (b).

*Shipping Co. Ltd, Shanghai Branch*,<sup>33</sup> the cargo was rejected by the consignee (buyer) due to the contamination that occurred in transit. Later, the cargo was carried back to the shipper (seller) and the shipper agreed to re-deliver substitute cargo to the buyer. The shipper then brought an action against the carrier to claim indemnity for the cargo loss. The court upheld the shipper's contractual right to sue the carrier on two grounds: first, the shipper was the party who suffered actual loss as a consequence of the carrier's breach of duty; second, as a party to the original contract of carriage, the shipper was always vested with the contractual right to sue the carrier regardless of whether such a right is transferred to a third party.

The case of *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company*,<sup>34</sup> has similar judgement. The court upheld the shipper's claim on two grounds. First, the seller's legal status as the shipper exists all the time irrespective of the transfer of the bill of lading. Second, the seller/shipper was the only party who sustained substantial loss after the transfer of the bill of lading.<sup>35</sup>

<sup>33</sup> (2007), Cited from *Selected maritime cases of Shanghai Maritime Court China*, at 59-63 (Xinlong Ying eds., 1st ed. Law Press China 2011).

<sup>34</sup> This case was decided by Guangdong Province, High court, Civil Judgment, No.104, (2012), and cited by Feifei Deng, *Shipper's right to sue in relation to carriage of goods by sea: the approach of Chinese court*, 19 JIML196, 197 (2013).

<sup>35</sup> In this case the goods were sold from Haze (China) to Entel (Turkey). After receiving the goods from Haze for delivery, the carrier issued a bill of lading, which named Haze as "shipper", Entel as "notify party", and marked the consignee as "to order". When the goods arrived at the destination (Turkey), Entel indorsed the bill of lading and surrendered it to the carrier in return for the delivery order. The goods were damaged during discharge. The inspection for the damaged cargo suggested that it was better to sell the goods in the local market as the cost of further examination and transportation of the goods back to China would be higher than their insurance value. After being informed such a result, Entel rejected the goods and asked the carrier to return the bill of lading to Haze. In order to mitigate the loss in a timely manner, Haze accepted the rejection and agreed to cancel the letter of credit. The damaged goods were finally sold to another local buyer with a deducted price. The insurer (PICC) of Haze indemnified Haze for his loss and sued the carrier who caused the loss by exercising subrogation right. The carrier argued

(c) Judgements against the shipper

By contrast to the above decisions, some courts made different judgements on cases which have similar facts as the above cases.

In *Beijing Wen-yang Imp. & Exp. Co. Ltd. v. Shanghai COSCO Shipping Co. Ltd.*,<sup>36</sup> the FOB seller, Beijing Wen-yang Imp. & Exp. Co. Ltd, delivered goods to an agent of the carrier. Upon shipment, the agent issued the bill of lading on behalf of the carrier to the seller (Wen-yang) after receiving the pre-paid freight from the seller. As per the requirement listed on the letter of credit, the FOB buyer was named as 'shipper' on the bill of lading, and the consignee was 'to order of the buyer'. The goods were delivered to the buyer in Singapore without against the presentation of the original bill of lading. Subsequently, the seller's request for payment for the goods was rejected by the bank on the ground that the bill of lading was not endorsed by the buyer/shipper. Then the bank sent all documents back to the seller who then brought an action against the carrier for misdelivery of the goods. The action was dismissed by the court on the ground that there was no contractual relationship between the seller and the carrier as the seller was neither the party who was named on the bill of lading nor the party to whom the bill of

that PICC had no right of suit because its insured Haze had no right to sue since the bill of lading had been endorsed and transferred to the buyer who presented it to the carrier before the occurrence of the loss. The key issue of the dispute in this case rested on whether Haze (the shipper) was still entitled to sue the carrier after the bill of lading was endorsed and surrendered to the carrier by the buyer.

<sup>36</sup> (1999) High People's Court of Tianjin. Cited from Wei Wang, *Law and Practice for the Delivery of Goods without Presentation of Original Bills of Lading-A Comparative Study on Relevant Legal Issues of International Carriage of Goods by Sea*, at 141-142 (1<sup>st</sup> ed. Law Press 2010).



lading was duly endorsed.<sup>37</sup>

The facts of this case was very similar to the case of *Zhejiang Textiles*.<sup>38</sup> In both cases, the seller performed as an ‘actual shipper’ but was not named on the bill of lading and the seller suffered loss due to the fact that the carrier released the goods without against presenting the bill of lading and the buyer rejected to pay the price for the goods, and the bills of lading were sent back to him by the bank without proper indorsement.<sup>39</sup> However, the decisions for these two cases are quite different.

In *Hainan Tonglian Shipping Company v. Minmetals International Nonferrous Metals Trading Company*,<sup>40</sup> although the shipper (seller) was the party who suffered the actual loss after reaching a settlement with the holder (buyer) of the bill of lading based on the sale contract, the court held that the contractual right to sue the carrier should be vested in the holder rather than the shipper as the bill of lading had been transferred to the holder with due endorsement when the loss had occurred.

<sup>37</sup> Although the Court dismissed Wenyang’s legal status as the shipper, in fact Wenyang should have been deemed as the shipper by the reason that it actually performed the shipper’s obligation in delivering the goods to the carrier. In this sense, Wenyang fulfilled the legal requirement of “Actual Shipper” provided by Article 42 (3) of CMC. According to this article, “Shipper means:...b) The person by whom or in whose name or on whose behalf the goods have delivered to the carrier involved in the contract of carriage of goods by sea.” The legal status of “actual shipper” now has been commonly recognized by Chinese courts.

<sup>38</sup> *Zhejiang Textiles Import & Export Group Ltd. v. Taiwan Uniglory Marine Co.*, decided by Higher People’s Court of Shanghai Municipality (2005). Cited from *Selected maritime cases of Shanghai Maritime Court China*, at 87-88 (Xinlong Ying eds., 1<sup>st</sup> ed. Law Press China 2011).

<sup>39</sup> In this case, the FOB seller was held neither as being a shipper nor as being a holder of bills of lading.

<sup>40</sup> *Hainan Tonglian Shipping Company v. Minmetals International Nonferrous Metals Trading Company* [1996], 6 Gazette of the Supreme People’s Court of the People’s Republic of China 1999.

### III

#### **SHOULD A SHIPPER BE ALLOWED TO RETAIN THE RIGHT TO SUE AFTER THE TRANSFER OF BILL OF LADING?**

Controversial views in academia and different judicial judgements in China have been examined, the controversy may be directly attributable to the legislative gap in the CMC. To reduce disputes the Law should provide clear rules on the issue whether the shipper should be allowed to retain the right to sue after the transfer of bill of lading. What approach should be adopted in the CMC on this point, it is submitted, depends on whether the shipper suffers substantial loss after the bill of lading being transferred.

In cargo claims, normally the claimant should be the party who suffers loss or damage due to the carrier's breach of his duty under the contract of carriage. In the case where bills of lading are involved, this party is usually the consignee or endorsee (the buyer) to whom the bill of lading has been transferred in pursuance of the arrangement with respect to the underlying transaction of goods.<sup>41</sup> Such a consequence can be attributed to the general rules regarding passing of risk of goods<sup>42</sup> together with the key role of the bill of lading in payment of goods.<sup>43</sup>

In an international transaction, as a general rule, if the sale is concluded on *shipment*

<sup>41</sup> Simon Baughen, *Shipping Law*, at 19 (6th ed. Routledge-Cavendish 2015).

<sup>42</sup> Under English common law the risks to goods passes on shipment, and according to Incoterms 2010, as to the most prevailing international trade terms such as FOB, CFR and CIF, the risk of goods is passed at the time when the goods have been delivered on board the vessel.

<sup>43</sup> This role is mainly reflected from the document's capacity to "prove (to the buyer) that the sold goods were indeed delivered as requested under the sale contract at loading port." By virtue of such a capacity, the buyer's bank would be willing to arrange payment under the Letter of Credit when the bill of lading arrives. See Ziegler, *Supra* note 1, at 276.

*terms*, the risk to goods passes to the buyer from the seller on shipment under English common law<sup>44</sup> or passes when the goods have been delivered on board the vessel under Incoterms 2010.<sup>45</sup> Where the risk passes, the seller is allowed to tender bill of lading and other shipping documents even after the goods they represent have been damaged or lost.<sup>46</sup> If the goods suffer loss in transit after risk has passed, the buyer may sue the carrier with the bill of lading tendered by the seller. Where the risk is borne by the buyer it is difficult to say how the seller suffers loss in the course of transit. If the buyer rejects the damaged goods the seller may sue the buyer who defaults the sale contract rather than the carrier.

However, the trading reality is far more complex and sometimes it may be the seller/shipper who sustains loss or damage even though the bill of lading has been transferred to the buyer at that time. There are exceptions to the general rules regarding the passing of risk. As noted by Lorenzon, the parties, based on the freedom of contract principle, ‘may well decide to allocate the risks associated with the carriage of the goods sold as they see fit.’<sup>47</sup> In practice, this is usually achieved by drafting an *outturn* clauses on the ‘quantity, quality or condition of the cargo at the port of discharge.’<sup>48</sup> By virtue of such a clause, the seller may still assume the risk if the goods are lost or

<sup>44</sup> *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402.

<sup>45</sup> See the English case of *Comptoir d’Achat et de Vente u Boerenbond Belge SA v Luis de Ridder Ltd (The Julia)* [1949] A.C. 293. Under Incoterms 2010, the risk passes when the goods have been delivered on board the vessel. See Incoterms FOB and CIF rules A5 and B5.

<sup>46</sup> *Comptoir d’Achat et de Vente u Boerenbond Belge SA v Luis de Ridder Ltd (The Julia)* [1949] 1 All E.R. 269.

<sup>47</sup> Filippo Lorenzon, *International Trade and Shipping Documents* in *Maritime Law*, at 100 (Yvonne Baatz eds, 3rd ed. Informa 2014).

<sup>48</sup> *id.*

damaged during transit.<sup>49</sup> Also, in commercial practice a provision, indicating the payment is to be against documents ‘on arrival of the goods’, is quite common.<sup>50</sup> This by nature makes the arrival of goods as a condition for paying the price of goods. For example, in *Dupont v British South Africa Co*,<sup>51</sup> where the contract, provided for CIF Beira, contained the clause that requires half of the payment was ‘payable on shipment in exchange for the documents and the balance was to be paid upon delivery of the shipments.’<sup>52</sup> Given that, Kennedy J. held that the balance of the payment was only payable provided that the goods actually arrived at the destination.<sup>53</sup> That is to say, if the goods are not actually delivered, the buyer would not pay the price. Then the seller who has transferred the bill of lading to the buyer will suffer a substantial loss.

From the above discussion, it can be seen that the factors which may trigger the assumption of loss or damage to the shipper after the transfer of the bill of lading are closely related to the arrangement with respect to the commercial transaction of goods or the buyer’s breach of the sale contract by failing to pay the price of the goods. However, it is undeniable that the ultimate reason for such a loss or damage is the carrier’s breach of duty under the contract of carriage. In this sense, it seems unfair if the shipper is not entitled to sue the carrier who caused the loss to the goods.

<sup>49</sup> For example, this may happen if the outturn quantity is provided as “to be settled at the market price of the last day of discharge of the last ship to arrive”, FOSFA 54 cl.16, l. 171. See Filippo Lorenzon, International Trade and Shipping Documents in *Maritime Law*, at 100 (Yvonne Baatz eds, 3<sup>rd</sup> ed. Informa 2014).

<sup>50</sup> Filippo Lorenzon, David Myer Sassoon, Yvonne Baatz, Lynne Skajaa, C. Nicoll, C.I.F. and F.O.B. Contracts, at 58 (5<sup>th</sup> ed. Sweet & Maxwell 2012).

<sup>51</sup> *Dupont v British South Africa Co* (1901) 18 T.L.R. 24; See also Filippo Lorenzon, David Myer Sassoon, Yvonne Baatz, Lynne Skajaa, C. Nicoll, C.I.F. and F.O.B. Contracts, at 58 (5<sup>th</sup> ed. Sweet & Maxwell 2012).

<sup>52</sup> Filippo Lorenzon, David Myer Sassoon, Yvonne Baatz, Lynne Skajaa, C. Nicoll, C.I.F. and F.O.B. Contracts, at 58 (5<sup>th</sup> ed. Sweet & Maxwell 2012).

<sup>53</sup> *id.*

It is clear that, in practice, it does happen that the party who suffers real loss is the seller/shipper rather than the buyer under the following circumstances:

1. Goods are released by the carrier to the buyer without against presenting the original bill of lading and the seller/shipper has never been paid by the buyer.<sup>54</sup>
2. The buyer may sometimes default the sale contract, and reject goods damaged in transit by carrier for which he should pay the price to the seller and then sue the carrier for loss or sue the insurer for indemnity under the insurance policy. But instead of claiming against the carrier or the insurer, the buyer rejects the goods and does not pay the price. Thus the party who suffers real loss is the seller/shipper.<sup>55</sup>
3. Due to the special arrangement for the sale of goods by the parties, the risk has never passed to the buyer until the goods arrive the destination, although the bill of lading has been transferred to the buyer, for example where the contract is “an arrival” contract as shown by the case of *Dupont v British South Africa Co.*<sup>56</sup>
4. A FOB seller/shipper may even be in a worse position in terms of right to sue, because under a FOB contract the buyer is usually concludes the contract of carriage with the carrier, the seller who performs the actual shipper’s duty is usually not named as the shipper on the bill of lading. Such a shipper has less

<sup>54</sup> This is demonstrated by the Chinses cases discussed earlier: See *Beijing Wen-yang Imp. & Exp. Co. Ltd. v. Shanghai COSCO Shipping Co. Ltd.*; *Zhejiang Textiles Import & Export Group Ltd. v. Taiwan Uniglory Marine Corporation*.

<sup>55</sup> This is the case shown by *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company*. See discussion in “Judgements made for shipper”.

<sup>56</sup> *Dupont v British South Africa Co* (1901) 18 T.L.R. 24; See also Filippo Lorenzon, David Myer Sassoon, Yvonne Baatz, Lynne Skajaa, C. Nicoll, *C.I.F. and F.O.B. Contracts*, at 58 (5<sup>th</sup> ed. Sweet & Maxwell 2012).

protection on the point of right of suit.

It should be noted that in the above situations the seller/shipper is the only party who assumes the loss caused by the carriers' breach of contractual obligations. To maintain the fairness of the law and properly balance the interest between the carrier and the cargo interest, it is meaningful to develop a rule that enables the seller/shipper to sue the carrier after the transfer of bill of lading. It should be noted that rules regarding the seller/shipper's right to sue have been established in some other jurisdictions such as English law and American law although the ways in which the actions can be established vary from one regime to the next. The legislative attempt to vest a non-holder claimant with the contractual right to sue can also be found in the UNCITRAL Drafts for Rotterdam Rules.<sup>57</sup> These national and international approaches to various extent provide contractual or quasi-contractual solutions to the shipper by fully considering the potential relationship between the shipper's need to exercise the contractual right to sue the carrier and the performance of commercial transaction of the goods. The aforesaid experiences are reviewed below so as to seek some clues to

<sup>57</sup> United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.21) 2002, article 13.3 provides "In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage." United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.32) 2003, article 65 "In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is not the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made." United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly] [by Sea] (A/CN.9/WG.III/WP.56) 2005, Article 68 (b) "When the claimant is not the holder, must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made."

resolve the problem on shipper's title to sue in Chinese law and fill up the loophole in CMC. It is worth, at this stage, to examine the approaches established in these jurisdictions.

## IV

### APPROACHES IN OTHER JURISDICTIONS

#### *A. The English approach*

In English law, the Carriage of Goods by Sea Act 1992 (COGSA 1992) expressly vests in the lawful holder of the bill of lading the right to sue under the contract of carriage as if he had been a party to that contract. Section 2(1) provides:

Subject to the following provisions of this section, a person who becomes

(a) the lawful holder of a bill of lading;

shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

The law at the same time extinguishes the shipper's right to sue upon the transfer of the bill of lading by s.2(5), which provides:

Where rights are transferred by virtue of the operation of sub-section (1) above in relation to any document, the transfer for which that sub-section provides shall extinguish any entitlement to those rights which derives

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage, ....

Section 2(5)(a) deprives the shipper's right of suit against the carrier after the bill of

lading being transferred to the buyer. However, under English common law, the shipper may still be able to sue the carrier based on bailment contract.<sup>58</sup> Bailment is deemed as an independent cause of action at common law, which has both tortious character and contractual character.<sup>59</sup> A typical example of suit in bailment is *East West Corporation v DKBS 1912 A/S*,<sup>60</sup> where the seller/shipper and the buyer (named as notifying party on the bill of lading) agreed that the goods should be delivered at the destination against payment; however, the goods in fact were released to the buyer without tendering an original bill of lading and at that time only partial payment of goods was fulfilled by the buyer.<sup>61</sup> Although the seller/shipper was deemed to be divested the contractual right to sue by virtue of Section 2(5) of COGSA 1992, he was finally held entitled to sue the carrier based on bailment.<sup>62</sup>

It should be noted that such a decision was made on the ground of the particular facts in respect of the cargo transaction in this case. First, although the bills of lading were indorsed to the bank by the seller, the seller did so merely for requesting the bank to collect payment on his behalf and the seller retained the property of goods at all time.

<sup>58</sup> Under the UK law the shipper may have more than one alternative remedies other than the contractual remedy provided by COGSA 1992, for example, besides the title to sue in bailment, the shipper may also choose to sue the carrier in tort if he could prove that either the ownership or the immediate possession of goods is vested in him when the carrier's breach of duty occurred. However, the establishment of title to sue in tort in English law mainly depends on the arrangement of cargo transaction rather than the contractual relationship between the carrier and the shipper. That's why the suit in tort is not mentioned here.

<sup>59</sup> Simon Baughen, *Misdelivery and the Boundaries of Contract and Tort* 4 LMCLQ 413, 417 (2003).

<sup>60</sup> *East West Corporation v DKBS 1912 A/S* [2003] 2 ALL ER 700; [2003] EWCA Civ 83; [2003] QB 1509.

<sup>61</sup> *id.* In *East West Corporation*, the seller gave the bank instruction that the bills should be transferred to the buyer only when the full payment of goods were received.

<sup>62</sup> In *East West Corporation*, after shipment of goods, the seller (shipper) indorsed the bills of lading to his bank for collecting payment on the seller's behalf. Therefore, the lawful holder of the bill of lading in this case was the seller's bank rather than the seller.



Secondly, the seller instructed the bank that the bills should not be transferred to the buyer until the full payment of goods was received. In considering these facts, the Court of Appeal held that the immediate possession of goods was vested in the seller 'at all material times' and the seller at all times acted for themselves.<sup>63</sup> Also, the Court asserted that the bank was merely the agent of the seller although the bank acquired the status as a lawful holder pursuant to COGSA 1992.<sup>64</sup> This means that the relationship of bailment between the seller and the carrier existed at all times, and by which the seller was entitled to sue the carrier directly.<sup>65</sup> As shown from the aforesaid reasoning, if the claimant is the shipper who has transferred the bill of lading to the consignee, the court would inevitably examine the underlying trade relationship between the shipper and the holder so as to identify the true reason for the transfer of the bill of lading, and therefore to determine whether the bailment exists consistently between the shipper and the carrier. It is clear that the judgement of this case does not establish any general rule to vest in the seller/shipper a right to sue after the bill of lading being transferred.

### ***B. The American approach***

In American law, the issue whether the shipper is still entitled to sue the carrier in contract after transferring the bill of lading is not expressly dealt with by the statutory law. The relevant statute is the Federal Bills of Lading Act, 49 U.S.C.A.,<sup>66</sup> and s.80105 of the Act concerns "Title and rights affected by negotiation". It provides,

<sup>63</sup> *East West Corporation v DKBS 1912 A/S* [2003] 2 ALL ER 700, 701.

<sup>64</sup> *id.*

<sup>65</sup> *id.*

<sup>66</sup> See FBLA 1994, s.80105 "Title and rights affected by negotiation".

(a) Title - When a negotiable bill of lading is negotiated –

(1) The person to whom it is negotiated acquires the title to the goods;

From this subsection, it could be understood that after the bill of lading is negotiated the person to whom the bill is negotiated acquires the title to sue when he acquires the title to the goods,<sup>67</sup> because it is logical to believe that a person who has a title to goods should be entitled to sue another who causes loss to his goods although the Act does not expressly vest in him the title to sue. This is further evidenced by the second paragraph of s.80105, which provides,

(2) the common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person.

By viewing s.80105 (1) and (2) together, it can be seen that the person to whom the bill of lading is negotiated acquires both the title to goods and the title to sue the carrier. However, it is not clear whether or not the shipper may retain the title to sue after the bill of lading has been negotiated and after he has departed from the title to the goods.

<sup>67</sup> In *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al.* (296 F. Supp 2d 91, 2003 AMC 670 (D.P.R.2003)), the court stated that the general rule under an ordinary C.I.F. contract is that the seller/shipper's title to the goods may be transferred to the buyer/consignee upon delivery to the carrier at the port of loading. See, D.M. Day, *The Law of International Trade*, at 4 (1981). See also, *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla.App. 3 Dist. 1985) petition for review denied by *S.E.L. Maduro (Florida), Inc. v Kumar Corp.*, 476 So.2d 675 (Fla. 1985). As a result of the said title transferred, the consignee/buyer is ordinarily the party entitled to sue the carrier in case of any damage.

The common law in America has developed several exceptional occasions where the shipper may sue the carrier regardless of the title to the goods and the possession of the bill of lading. For example, the shipper without the bill of lading may sue if he acts as the buyer's agent in replacing and repairing the damaged goods, or he may sue if the buyer rejects the damaged goods and the shipper (seller) accepts rejection.<sup>68</sup> More importantly, under the American common law a party who sustains the substantial loss or damage to 'a proprietary interest' may also be deemed as an eligible claimant.<sup>69</sup> This approach further increases the possibility that the court will uphold the shipper who suffers substantial loss to sue the carrier irrespective of the title to goods and the possession of the bill of lading. An example in this regard can be seen from the following case.

In *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al.*,<sup>70</sup> the goods were sold in CIF term, during transit the goods suffered loss due to carrier's default. Both the title to goods and the risk of goods had been passed to the buyer at the time of loss. The buyer rejected the damaged goods. To mitigate the loss, the seller reached an agreement with the buyer that the buyer would accept part of the damaged goods at a discounted price. The seller thereby assumed the substantial loss due to the

<sup>68</sup> According to the American decided cases, the seller/shipper may sue the carrier in three situations: (1) when he acts as the consignee's representative, if said action is ratified by the latter; (2) when the shipper acted as the buyer/consignee's agent in replacing and repairing the damaged cargo; or (3) when the goods are rejected by the buyer and the seller accepts that rejection. See cases *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc.*, 620 F.2d at 4; *Armco Intern. Corp. v. Rederi A/B Disa*, 151 F.2d 5, 9 (2nd Cir. 1945); *Transmarine Corp. v. Levitt*, 25 F.2d 275, 278 (2nd Cir. 1928). See also William Tetley, *Marine Cargo Claims*, vol., at 472 (4th ed. Thomson Carswell 2008).

<sup>69</sup> Tomas J Schoenbaum, *Admiralty and Maritime Law*, at 535 (3rd ed. West Group 2001).

<sup>70</sup> *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al.*, 296 F. Supp 2d 91, 2003 AMC 670 (D.P.R. 2003).

deduction of the invoice price. The Court held that the seller/shipper was entitled to bring an action against the carrier to recover his loss.<sup>71</sup> As suggested by the judgement, the assumption of substantial loss or damage suffices to make a party a ‘real party in interest’ within the meaning of Rule 17(a) of the Federal Rules of Civil Procedure even though both the title to goods and the risk of goods had been passed,<sup>72</sup> and therefore the “real party in interest” should be vested with the title to sue even though the bill of lading has been negotiated to another party.

### ***C. The UNCITRAL approach***

The United Nations Commission on International Trade Law Drafts on the Carriage of Goods [Wholly or partly] [by Sea] (UNCITRAL Draft)<sup>73</sup> proposed some rules regarding “Rights of Suit”.<sup>74</sup> Chapter 14 of the UNCITRAL Draft concerned the “Rights of Suit”. Article 67 in Chapter 14 (parties who had right to sue) as set out in A/CN.9/WG.III/WP.56 provides as follows:

1. Without prejudice to articles 68 and 68 (b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:

<sup>71</sup> *id*, at 100.

<sup>72</sup> This is also evidenced by *C. Itoh & Co. (America), Inc. v. M/V Hans Leonhardt*, 719 F.supp. 479, at 500, 1990 AMC 733 (E.D. La.1989), in which the court stated that the claimants would be entitled to sue the carrier if they suffered the commercial loss in question. See also *Sumimoto Corp. of America v. M/V Saint Venture*, 683 F. Supp. 1361, 1368 (M.D.Fla.1988).

<sup>73</sup> More than one drafts proposed by UNCITRAL contained such kind of rules. Due to the similarity of these rules, only one draft is discussed here as an example. Therefore, the UNCITRAL Draft mentioned here refers to United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly] [by Sea] (A/CN.9/WG.III/WP.56).

<sup>74</sup> The Chapter of “Rights of Suit” had been incorporated in the Preliminary Draft of the Rotterdam Rules since 2002 and was abandoned in United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work of its eighteenth session (A/CN.9/616), 27 November 2006.

- (a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;
- (b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage; or
- (c) Any person to which the shipper or the consignee has transferred its rights, or that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer, to the extent that the person whose rights it has acquired by transfer or subrogation suffered loss or damage in consequence of a breach of the contract of carriage.

Article 67(1)(a) explicitly vest in the shipper the title to sue the carrier for loss or damage to the extent that it has suffered due to the carrier's in breach of the contract of carriage.

Article 68 subsequently provides,

In the event that a negotiable transport document or negotiable electronic transport record is issued: ... (b) When the claimant is not the holder, it must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.

From the aforesaid articles, it can be seen a noticeable character of the UNCITRAL

approach is that it underlines the linkage between the assumption of loss or damage and the exercise of the contractual right to sue the carrier. This is particularly the case in the situation where the claimant is a party who sustains loss or damage but fails to meet the legal standard as a holder.<sup>75</sup> Accordingly, if a shipper who has transferred to the bill of lading to the holder, besides proving his own loss or damage caused by the carrier's breach of duty, can also prove that the holder of the bill of lading does not suffer the same loss or damage, he is permitted to sue the carrier directly. By virtue of this rule, the assumption of loss or damage is treated as a sole and independent factor that enables cargo interest who suffers loss to sue.

This UNCITRAL Draft rule is the first legislative attempt to separate the title to sue from the possession of the bill of lading, although this may also be the case in American judicial practice<sup>76</sup>. By virtue of such an arrangement, on the one hand, a shipper who sustains loss or damage after the transfer of the bill of lading could acquire better protection through being granted a mandatory remedy. From the carrier's perspective, on the other hand, the requirement of proving the exclusivity of loss or damage assumed

<sup>75</sup> Under the UNCITRAL Draft (A/CN.9/WG.III/WP.56), article 1 (j) "Holder means a person that:  
(i) a person that is for the time being in possession of a negotiable transport document and  
(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or  
(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof;  
In view of this rule, if the shipper for some reason re-obtains the bill of lading from the holder, even at this time the bill of lading was not transferred in a proper way, for instance, without the indorsement of the holder, the shipper may still acquire the legal status as holder if he is named as shipper on the bill of lading. Under such a situation, the shipper should be able to sue the carrier in contract as a holder. Nevertheless, the aforesaid rule may not apply to the situation where the shipper performs the obligation as an actual shipper but is not named as the shipper on the bill of lading. For discussion of this type of shipper, see discussion in the part "The definition for shipper under the CMC."

<sup>76</sup> *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al* 296 F. Supp 2d 91, 2003 AMC 670 (D.P.R.2003)

by the claimant is expected to reduce the carrier's risk of suffering multiple claims brought by more than one claimants. The UNCITRAL Drafts reflected the intention to protect the cargo interests' substantial interest rather than mechanically lock the contractual right of suit into a certain single party such as the holder of the bill of lading.<sup>77</sup> In this way, the shipper who suffers substantial loss may remain the right to sue even if the bill of lading has been transferred. It is submitted that the approach proposed by the UNCITRAL Draft is reasonable which could balance the parties' interests rather than prejudice their interests.

Generally the purposes of any international convention are to combine the characters of many jurisdictions together, and attempt to harmonize rules of laws across different jurisdictions. Similarly, the UNCITRAL approach was expected to provide a model for the jurisdictions where the issues in respect of title to sue have not been explicitly addressed by the national laws.<sup>78</sup> Unfortunately, the rule regarding "Rights of Suit" proposed by the UNCITRAL Draft was not adopted by the Rotterdam Rules (2008) due to the disagreement on it by the delegates.<sup>79</sup>

<sup>77</sup> United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work its eleventh session (A/CN.9/526), 4 April 2003, para 152, which suggests that the cargo claimant should have "sufficient interest" to the cargo claim.

<sup>78</sup> Wenjun Wang, the legal basis to establish a right of suit relating to bill of lading, at 181-192 (1st ed. Law Press China, 2010); See also Francesco Berlingieri, Revisiting the Rotterdam Rules LMCLQ 583, 639 (2010) "while Article 57 sets out principles that are obvious in a great many jurisdictions, nevertheless it may be of some assistance in those jurisdictions where they are not so obvious and, therefore, may ensure a greater uniformity." Although the author's original argument only refers to the Article 57 (transfer of rights) under the Rotterdam Rules, it is submitted that such an argument should also apply to the rules under the UNCITRAL Draft, as the Drafts share the same purpose as the Rotterdam Rules.

<sup>79</sup> As indicated by UNCITRAL Report of Working Group III (Transport Law) on the work of its eighteenth session (A/CN.9/616) 27 November 2006, the chapter of "Right of suit" was "overly ambitious and that is was unlikely that the working group could reach a consensus on the substance dealt with therein." As a result, the chapter of "Right of suit" was deleted in its entirety.

## V

### **CONCLUSION AND RECOMMENDATIONS FOR REFORM OF THE CMC**

The loophole in the CMC regarding the shipper's right to sue has caused and will continuous to cause disputes and controversial judicial judgements. The CMC needs urgent reform in this respect. In order to find a good solution, different approaches on this issue are critically analysed. Circumstances under which such a shipper may suffer loss are also discussed. In any of these given situations, the shipper is innocent but ultimately assumes the substantial loss. Therefore, it is unreasonable to prevent such a shipper from suing the carrier and to lock the right of suit to the buyer. Conversely, the right of suit should be restored to the shipper so as to make sure that the right of suit vested in the party who suffered real loss due to the carrier's fault.

By comparing different solutions provided by the different regimes, it can be seen that the American and the UNCITRAL approaches are more favourable to the shipper's interest than that of English law. Under the UK COGSA 1992, the shipper at any rate is not allowed to sue the carrier after the bill of lading has been transferred to a lawful holder,<sup>80</sup> even though the shipper is the party who sustains substantial loss caused by the carrier's breach of duty under the contract of carriage. The rationale of the English approach is to limit the multiplicity of the claims against the carrier. Conversely, the American common law has developed some rules to protect a shipper's right to sue

<sup>80</sup> See COGSA 1992, s.2(1) and s.2(5)(a).



where the shipper can prove that he has a substantial interest to the cargo claim.<sup>81</sup> Such a position is further developed by the UNCITRAL Drafts, which expressly allows a non-holder claimant, including the shipper who has transferred the bill of lading to another party, to bring a contractual action to sue the carrier if the claimant is able to prove that the loss or damage in question is not assumed by the holder of the bill, but is rather assumed by himself.<sup>82</sup> This in essence makes the assumption of substantial loss or damage a cause of action independent of the possession of bill of lading.

As examined, in maritime practice, it is not uncommon that the person who suffers substantial loss after the transfer of the bill of lading is the seller/shipper rather the consignee/buyer. It is therefore recommend that, with reference to the approaches of England, America and the UNCITRAL Drafts, the CMC should add a provision vesting in the shipper a right to sue irrespective whether the bill of lading has been transferred or not, provided that the shipper, in addition to proving his own loss, is able to prove that the holder does not suffer the same loss. It is expected that such an arrangement would better fulfill the interest of both the shipper the carrier. On the one hand, the shipper would secure his right of suit to recover his loss caused by the carrier's default; on the other hand, the mandatory requirement of proving the exclusivity of the loss

<sup>81</sup> *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al.*, (296 F. Supp 2d 91, 2003 AMC 670 (D.P.R.2003)).

<sup>82</sup> See the UNCITRAL Drafts for the Rotterdam Rules, which include United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.21), 8 January 2002; United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work of its eleventh session (A/CN.9/526), 4 April 2003; United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.32) 4 September 2003; United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.56) 8 September 2005; United Nations Commission on International Trade, Transport Law : Preparation of a draft convention on the carriage of goods [wholly or partly][by sea] Right of suit and time for suit: document presented for information by the Government of Japan (A/CN.9/WG.III/WP.76).

suffered by the shipper would mitigate the carrier's risk of suffering multiple claims.

Under such a perspective, the loophole in the CMC that gives rise to the problem of shipper's title to sue would be closed up.